

MARKET ENFORCEMENT REGULATIONS

Effective January 2001

CHAPTER 2.2 MARKET ENFORCEMENT

SUBCHAPTER 1. LICENSING

ARTICLE 1. GENERAL PROVISIONS

Section	1700.1	Definitions
	1700.2	Records
	1700.3	Confidentiality of Records

ARTICLE 2. THE APPLICATION PROCESS

Section	1701	Application
	1701.1	Application for Sole Proprietorship, Partnership or Agent's License
	1701.2	Application for Limited Liability Company or Corporation
	1701.3	Application Renewal
	1701.4	Application Processing
	1701.5	License Processing
	1701.6	Appeal Procedures When License is Denied
	1701.7	License Period; Forfeiture
	1701.8	Bonding

ARTICLE 3. INVESTIGATIONS

Section	1702	Reasonable Grounds for Investigations.
	1702.1	Criminal Records Exemption.

ARTICLE 4. PRIVATE DISPUTES

Section	1703	Alternate Dispute Resolution Initiation.
	1703.1	Alternative Dispute Resolution Pursuant to Parties' Written Contract.
	1703.2	Instituting Department's Alternative Dispute Resolution Procedure.
	1703.3	Request for Formal Alternative Dispute Resolution
	1703.4	AAA Hearing
	1703.5	What if I Filed a Verified Complaint Prior to January 1998.

ARTICLE 5. DISCIPLINE OF LICENSEES

Section	1704	Violations.
	1704.1	Appeal Procedures.
	1704.2	Effect of a Revocation.

ARTICLE 6. DISMISSALS, RANGE OF DISCIPLINE, AND SETTLEMENTS

Section	1705	General.
---------	------	----------

ARTICLE 7. HEARING PROCEDURES

Section	1706	License Denial
	1706.1	Accusation

ARTICLE 1. GENERAL PROVISIONS

Section 1700.1 DEFINITIONS.

Unless otherwise defined, the captions used in these regulations have no regulatory effect. Words and phrases carry their usual and customary meanings. For purposes of interpretation, the following special definitions apply:

- (a) "The Act" refers to Chapters 6 and 7 of Division 20 of the Food and Agricultural Code, commencing with section 55401;
- (b) "Applicant" means only the legal entity applying for a license.
- (c) "Control" means the possession of the power to direct or cause the direction of the management and policies of any person.
- (d) "License" means official permission to do something. It includes any indicia of authority issued by the Department. These indicia include documents entitled license, registration, exemption, permit, or certificate. The terms, "indicia of authority," "registration," "exemption," "permit," or "certificate," mean "license."
- (e) "Person" includes an individual, partnership, corporation, limited liability company, firm, company, or other entity. For all purposes pertinent to these regulations a limited liability company shall be treated the same as a corporation.
- (f) "Principal Creditor" means a single creditor, secured or unsecured, who has provided long-term financing of a significant financial interest in the business licensed.
- (g) "Significant Financial Interest" means ownership of at least 10% of the shares of a corporation or at least 10% of the equity of a partnership or limited liability company.
- (h) "Significant Shareholder" means a shareholder who owns or controls at least 10% of the shares of a corporation.

Authority: Sections 262, 407, Food and Agricultural Code

Reference: Sections 55401, 56101, Food and Agricultural Code

Section 1700.2 RECORDS

- (a) Licensees shall keep the records required by The Act for *the later* of four years or the resolution of any outstanding complaints.
- (b) For all purposes associated with enforcement of The Act, the licensee's retention of each document required by Food and Agricultural Code section 56273.1 is prima facie evidence of a complete account of sale, but partial absence of such documentation is not conclusive evidence that the account of sale is incomplete. If the absence of documentation arises from factors beyond the control of the licensee, the licensee's testimony may be sufficient substitute for the documents themselves, and the resulting record may be considered complete.

Authority: Section 407, Food and Agriculture Code

Reference: Sections 404, 55611, 56301, Food and Agriculture Code

Section 1700.3 CONFIDENTIALITY OF RECORDS.

The Act requires the Department and its employees hold confidential information derived from the operation of The Act. The Department and its employees may release this information to the public only under certain circumstances specified in The Act. Every employee who works within the programmatic purview of The Act shall read and sign a statement to that effect. The Department shall place this statement in the employee's personnel file.

Authority: Sections 407, 55483(c), 56183.5(c), Food and Agricultural Code

Reference: Sections 404, 55435.5, 55483(b), Food and Agricultural Code

ARTICLE 2. THE APPLICATION PROCESS

Section 1701. Application

- (a) Applicants shall use the Department's preprinted form.
 - (1) Applicants shall obtain an application for license package from the Department's Market Enforcement Branch. This package includes, as a minimum, the Department's preprinted

forms (Application for License [28-003 (Rev. 04/00)]; Application for Agent License [28-004 (Rev. 04/00)]; Market Enforcement License Affidavit [28-003B (Rev. 04/00)]/Cash Buyers Statement [28-016 (Rev. 04/00)], a two-sided form; Notice of Review of Criminal Information [28-003C (Est. 1/98)]/Notice of Review of Credit Information [280003D (Est. 3/98)], a two-sided form, a copy of the applicable statutes, and a copy of these regulations. the statutes and regulations shall only be sent to first-time applicants. An applicant should read both the regulations and the statutes prior to completing the application.

(b) Applicants shall submit the completed application to the Department's Market Enforcement Branch.

Authority: Sections 407, 55483(c), 56183(c), Food and Agricultural Code

Reference: Sections 55483, 55522, 56182, Food and Agricultural Code

Section 1701.1 APPLICATION FOR SOLE PROPRIETOR, PARTNERSHIP OR AGENT'S LICENSE.

(a) The first-applicant shall supply the following information:

(1) The business name, address, telephone number, mandatory social security number, birth date, and driver's license(s)/identification number(s) of the applicant:

(2) The names, addresses, and telephone numbers of principal creditors of the business, if any:

(3) The principal place of business and telephone number in California;

(4) The date of submission;

(5) Self-disclosure of previous license revocations(s) or suspension(s), convictions for financial crimes as described in section 1702.1(a)(5);

(6) A description of the business to be licensed

(7) If the application is for an agent's license only, the name, address and telephone number of the person whom the agent represents and the signature of the person's authorized officer or principal endorsing the application;

(b) The first-time applicant shall attach the following documents prior to submission:

(1) A list of any current licenses and/or licenses from the previous five years issued by the Department for the applicant;

(2) a list by an individual of any current licenses and/or licenses from the previous five years issued by the Department for a partner or affiliate of a partnership applicant;

(3) A list by an individual of any current licenses and/or licenses from the previous five years issued by the Department for any agent of the applicant;

(4) A signed acknowledgment that the applicant has been informed of the Department's authority to obtain financial information concerning the applicant from credit reporting agencies, creditors, or financial institutions;

(5) A signed acknowledgment that the applicant has been informed of the Department's authority to obtain criminal record information concerning the applicant or its agent(s);

(6) The affidavit, required by Food and Agricultural Code section 56189, if any;

(7) A schedule of Charges if the applicant is acting as a broker and/or commission merchant:

(8) Full payment of all fees required on the application;

(9) A list of California commodities handled;

(10) For Cash Buyers and Cash Buying Processors, a statement of understanding that all transactions shall be made in cash;

(11) A list of farm products creditors owed sums that are delinquent, if any, including their names, addresses, and amounts owed; and,

(12) A copy of the formal fictitious name statement for an applicant who notes a "doing business as" (d.b.a.). This is the statement on file with the county in which the applicant does business.

Authority: Sections 401, 55483(c), 56183.5(c), Food and Agricultural Code
Reference: Sections 404, 5484.75, 55485, 55523, 55524.75, 55525, 56183.5, 56186, 56189, 56571.7, Food and Agricultural Code

Section 1701.2 APPLICATION FOR LIMITED LIABILITY COMPANY OR CORPORATION.

(a) The first-time applicant shall supply the following information:

(1) The business name, business address, telephone number, and taxpayer identification number of the Limited Liability Company or corporation. In addition, the birth date and driver's license(s)/identification number(s) of any chief executive officer/president or chief financial officer/treasurer of any California based Limited Liability Company or corporation. For any non-California based limited liability or corporation, the birth date and driver's license(s)/identification number(s) of the agent for service of summons listed with the Secretary of State;

(2) Other information required for all applicants in Sections 1701.1(a)(2) through 1701.1(a)(6) of these regulations.

(b) The application shall be signed by an authorized representative

(c) The first-time applicant shall attach the following documents prior to submission:

(1) A list by an individual of any current licenses and/or licenses from the previous five years issued by the Department for any member of a limited liability company, corporate officer, or significant shareholder of a corporate applicant;

(2) For corporations or partnerships, an acknowledgment of criminal record access signed by the authorized company representative and each agent;

(3) A limited liability company or corporation not registered with the California Secretary of State shall attach its Articles of Incorporation and registration with its State or County of incorporation;

(4) Other attachments required for all applicants by Section 1701.1(b)(3) through Section 1701.(b)(12).

Authority: Sections 407, 55483(c), 56183.5(c), Food and Agricultural Code
Reference: Sections 404, 5484.75, 55485, 55523, 55524.75, 55525, 56183.5, 56186, 56189, 56571.7, Food and Agricultural Code

Section 1701.3 APPLICATION RENEWAL.

Renewal applications need only provide changes to the information requested in Sections 1701.1 or 1701.2 of these regulations.

Authority: Sections 407, 55483(c), 56183.5(c), Food and Agricultural Code
Reference: Sections 404, 5484.75, 55485, 55523, 55524.75, 55525, 56183.5, 56186, 56189, 56571.7, Food and Agricultural Code

Section 1701.4 APPLICATION PROCESSING.

(a) The department shall reject an incomplete application, but the applicant may cure defects if he or she does so within the prescribed time frame.

(1) After initial submission and review, the Department shall provide an applicant whose application is incomplete written notice at the applicant's address listed on the application. This notice shall specify the missing information. The applicant has sixty (60) calendar days from the date of the notice to supply the missing information. The notice shall also specify that failure to postmark a complete application within the sixty (60) days may result in denial of the application.

(b) After submission of the application, applicants shall additionally submit the following if the Department asks the applicant to do so:

(1) Proof of Bond if the Department requires a bond, as described in the Act:

(a) the applicant may obtain an endorsement on a pre-existing bond if:

1. the prior bond holder agrees in writing, and

2. the bond was established for the same or a similar purpose. This

includes a bond obtained to satisfy the requirements of the federal Perishable Agricultural Commodities Act (PACA)

(b) Subject to statutory minimums, the face value of the bond shall be at least 20% of the dollar volume of the applicant's business. the applicant may submit a Certificate of Deposit or another document of like integrity as the bond. The substitute shall be disapproved if the Department is not fully satisfied that the substitute is of like integrity.

(2) A Request for Exemption and the Department-approved exemption package, if applicant requests exemption for someone convicted of a crime affecting licensure under The Act, as described in Section 1702.1 of these regulations.

(c) The 90-day time frame in which the Department shall decide whether to approve the license does not begin until after the Department receives the last of the requested documents.

(d) Application Fees are not refundable.

(e) The Department shall consider an application incomplete, and deny it, unless the applicant submits requested documents and full payment fees within sixty (60) calendar days from the date the Department requests them, with one exception. The exception is:

(1) Proof of Bond. If the applicant applied for a bond, but has not yet received proof from the bonding company, the Department may approve a conditional license instead of denying one altogether. The applicant shall have met all other conditions of licensure. If the Department approves the conditional license, the following conditions shall be met:

(A) the licensee shall, within ninety (90) days, submit proof that the bond has been secured;

(B) the licensee shall post the proof beside the license until issuance of a new, unconditional license;

(2) If licensee fails to secure a bond within ninety (90) days, the conditional license automatically expires; and,

(A) failure to submit and post proof within ninety (90) days is prima facie evidence of a failure to secure the bond.

(f) The Conditional License shall state that it is conditional, and the conditions listed above shall be printed on the face of the Conditional License.

Authority: Sections 407, 55483(c), 56183.5(c), Food and Agricultural Code

Reference: Sections 263, 404, 55435.5(a), 55435.5(b), 55483, 55484.75, 55485, 55524.75, 55525, 55527.6, 55741(c), 56183.5, 56185.75, 56186, 56571, Food and Agricultural Code; Section 15376, Government Code

Section 1701.5 LICENSE PROCESSING.

(a) The Department shall not issue a license to certain persons specified in Food and Agricultural Code Sections 55484.75, 55524.75, and 56185.75. If the Department finds that an applicant is one of those persons, the Department shall cease review of the application and notify the applicant as soon as possible. This notice is not a denial under the law and does not convey any rights to a hearing.

(b) The Department shall accept or deny an application within 90 days of receipt of the completed application as defined in Section 1701.4 of these regulations. The Department does not have a power to grant extensions of time. Denial of an application means the applicant shall not reapply for thirty (30) days. Applicants should ensure required material can be timely collected to prevent denial by operation of law.

(c) If the Department approves the license, the Department shall issue the applicant a document evidencing the approval. If the Department denies the license, the Department shall notify the applicant in writing. The notice shall include a statement of issues setting forth the grounds for denial.

(d) If the Department denies the license:

(1) The Department shall track the denial by the name(s) and social security numbers of the applicants. Submission of the application to the Department operates as consent to this tracking.

(2) The Department shall not consider a new application from the same applicant for a period of time required by statute. That period is thirty (30) days from *the later* of the date found on an uncontested Notice of Denial or the effective date of the Decision and Order upholding a contested Notice of Denial, as described in Article 7 of these regulations. If the Department finds

such a prior denial, the Department shall cease to consider the application and notify the applicant as soon as possible. This notification shall not be construed to be a denial. It conveys no hearing rights under Article 7 of these regulations.

Authority: Sections 407, 55483(c), 56183.5(c) Food and Agricultural Code
Reference: Sections 263, 404, 55485, 55488(e), and (f), 55525, 55528(e) and (f), 56186, 56190(e) and (f), Food and Agricultural Code; Chapter 4.5 (commencing with Sections 11500), Section 15376, Government Code

Section 1701.6 LICENSE PERIOD; FORFEITURE.

(a) If the license is denied, there are two methods by which an appeal can be made: a writ pursuant to the Code of Civil Procedure, or an administrative hearing as described in Article 7 of these regulations. The Department shall not tell the applicant the course he or she should follow. However, it is considered best practice to pursue administrative remedies first. Denied applicants may wish to seek the advise of counsel.

Authority: Section 407, Food and Agricultural Code
Reference: Sections 55528, 56190, Food and Agricultural Code; Section 1084, et seq., Code of Civil Procedure

Section 1701.7 LICENSE PERIOD; FORFEITURE.

(a) A license is valid for one full year from date of issuance. A licensee shall renew his or her license each year for it to remain valid. The licensee can expect it to be renewed unless the Department revokes it or unless it has been forfeited due to one of the following events:

- (1) the holder surrenders the license;
- (2) the holder dies;
- (3) the partnership dissolves;
- (4) the holder of a significant financial interest in a corporation or limited liability company transfers his or her interest to another person or entity; or,
- (5) the holder files for bankruptcy under provisions other than those permitting and governing reorganization under bankruptcy.

(b) Forfeiture takes place by operation of law. The licensee has no administrative hearing rights. The Department shall not "reissue" a license that is forfeited or "rescind" a forfeiture. The former licensee shall submit a new application, in order to receive a license. It shall be treated in all respects except one, bonding, as an initial application. Licensees should time transfers of ownership so as not to forfeit the old license before the Department issues the new license. The Department shall not change the result of a mistimed transfer of ownership.

Authority: Sections 407, Food and Agriculture Code
Reference: Sections 262, 404, 55485.5, 55524.75, 56133.5(b), 56182.6, 56185.75, 56186.5, Food and Agricultural Code

Section 1701.8 BONDING.

(a) Under circumstances outlined in The Act, the Department shall require a bond. This statutory requirement may affect the denied applicant who subsequently seeks to become an agent as well as the denied applicant who reapplies for the original license type. A bond may be required on both the agent and the employer.

(b) Bonding procedures are described in Section 1701.4 of these regulations.

Authority: Sections 407, Food and Agricultural Code
Reference: Sections 404, 55435.5(b), 55527.6, 56133.5(b), 56189.5, Food and Agricultural Code

ARTICLE 3. INVESTIGATIONS

Section 1702. REASONABLE GROUNDS FOR INVESTIGATION.

(a) The Act authorizes the Department to investigate a Verified Complaint submitted (including but not limited to complaints submitted to initiate Alternate Dispute Resolution (ADR) as described in Section 1703 of the these regulations) and requires that the Department investigate if, "in the opinion of the Department," there appears to be "reasonable grounds" to investigate.

(1) "In the opinion of the Department" means the Department has some discretion. This discretion is limited by case law, practice, The Act, and these regulations.

(2) "Reasonable grounds" means the Department has information which a reasonable and trained investigator would recognize as supporting, although not necessarily proving, the essential elements of a flagrant or repeated violation of a licensing requirement. Gossip, innuendo, or unverified and anonymous tips are insufficient to constitute reasonable grounds.

(3) The Department may investigate the financial stability of an agent or individual with a significant financial interest during the course of an investigation. A signed release authorizing the Department to obtain financial information concerning an agent or an individual with a significant financial interest from credit reporting agencies, creditors, or financial institutions shall be requested by the Department in the event of such an investigation.

(4) These principles apply not only to the initial decision to investigate or not to investigate, but to decisions to keep an investigation going or to close it.

(5) Complainants may obtain Verified Complaint forms [28-012(Rev. 11/98)] at the Market Enforcement headquarters office.

Authority: Sections 407, 55483(c) and 56183.5(c), Food and Agricultural Code

Reference: Sections 404, 408, 55721, 56381, 56382.5, Food and Agricultural Code

Section 1702.1 CRIMINAL RECORDS EXEMPTION.

(a) The Act requires that an exemption be obtained for a licensee to associate individuals specified in The Act who have been convicted of a crime that includes as one of its elements the financial victimization of another. Such crimes are exemplified in California by the California Penal Code chapter/sections which follow, but include similar crimes from other jurisdictions (which are not listed):

(1) Title 8, Chapter 4, section 211 et seq. (Robbery);

(2) Title 9, chapter 9 [section 319 et seq. (Lottery)], chapter 10 [section 330 et seq. (Gaming)], Chapter 10.5 [section 337.1 et seq. (Horse Racing)], Chapter 11 [section 343 et seq. (Gold Purchasing)], and Chapter 12, section 350 (counterfeit of registered mark), section 351a (false use of sales dealer's name), section 356 (false mark in lumber sale);

(3) Title 10, section 395 (false statements to affect market price);

(4) Title 12, section 424 et seq. (Crimes against the Revenue and Property of the State); and

(5) Title 13, Chapters 2 [section 458 et seq. (Burglary)], 4 [section 470 et seq. (Forgery and Counterfeiting)], 5 [section 484 et seq. (Theft)], 6 [section 503 et seq. (Embezzlement)]; 7 [section 518 et seq. (Extortion)]; 8 [section 528 et seq. (False Personation and Cheats)]; 10 [section 548 et seq. (Insurance fraud)]; 12.5 [section 560 et seq. (Bailments)]; 12.6 [section 565 et seq. (Crimes involving dairy equipment)]; 14 [section 557 et seq. (Fraudulent documentation of title to merchandise)].

(b) The Department shall obtain a criminal record from the California Department of Justice (DOJ) when it has reasonable basis to believe a person has been convicted of a crime as set out herein, or when investigating the licensee for alleged violations of the Act. The Department shall not otherwise obtain such records on all applicants or persons specified in The Act.

(c) If the criminal record discloses a relevant conviction, the Department shall give notice to the licensee of the need to obtain an exemption. If granted, the exemption permits the licensee to employ the designated person or, in the case where the convicted person is the licensee, to maintain the license.

(1) The notice shall not communicate the specifics of the conviction. The notice shall only include the fact that a relevant conviction appeared during the criminal record review. the

notice shall be accompanied by an exemption packet which shall provide the applicable documentations.

(2) The Department may set and adjust the time frame for response, considering the circumstances of the licensee, a reasonable time allowance for obtaining documentation, and the egregiousness, frequency, and recency of the underlying crime(s).

(d) If the Department does not grant an exemption, the Department shall notify the licensee using a Statement of Issues (if an application is in progress) or an Accusation (if the license has already been issued), even if the Department is not expecting to actually discipline the licensee. The licensee may either submit a Plan of Correction that eliminates the association of the non-exempt person or submit a Notice of Defense to appeal the decision.

(1) Where the exemption denial is for an employee, the matter may be appealed by the licensee/applicant, the employee, or both.

(e) The appeal shall be heard under the standards set out in The Act for appeals from exemption decisions and the procedures set out in these regulations for denial or revocation under Article 7. The burdens of proof and producing evidence standards shall apply to an revocation as described in Article 7 of these regulations.

(f) A licensee or applicant should review Food and Agricultural Code section 55435.5 or 56133.5 as applicable to his or her license.

Authority: Sections 407, Food and Agricultural Code

Reference: Sections 263, 404, 55435.5, 55485.75, 55488, 55525.75, 55528, 56133.5, (commencing with section 11400), Chapter 5 (commencing with section 11500), Government Code; Part 2 (commencing with section 307); Code of Civil Procedure

ARTICLE 4. PRIVATE DISPUTES

Section 1703. ALTERNATIVE DISPUTE RESOLUTION INITIATION.

(a) An aggrieved grower of licensee may initiate Alternative Dispute Resolution (ADR) through the Department by filing a Verified Complaint within nine (9) months of when a dispute arises, as specified in the Act.

(1) Compliance with the 9-month time frame is jurisdictional and the complainant shall prove compliance.

(A) The provisions of a valid, written contract between the complainant and the licensee are conclusive evidence of due date where the contract addresses due date for account of sales.

(B) In the absence of a written contract the complainant may prove dates through other competent evidence. This evidence could include-but is not limited to-past practice affidavits, letters, indicative behavior of parties, or timing which established the account of sale could not have been due longer ago than nine (9) months from the filing of the Verified Complaint.

(C) Lacking a written contract or competent evidence, the Department shall conclude the complainant has not established compliance with the 9-month time frame.

(D) It is not necessary for the purposes of this section that the licensee render an actual, conforming account of sales.

(E) A purported "Account of Sale" is not complete unless it meets each and every element established by Food and Agricultural Code Section 56273.1. The issue in these circumstances is when an accounting was due, not whether one was done.

(b) If the underlying transaction is subject to the federal Packers and Stockyards Act, 1921 or ADR. This requirement is jurisdictional. The Department shall not waive it. Satisfying this requirement is the complainant's responsibility, not the Department's. The complainant shall secure written confirmation, signed by an appropriate official, that the transactions is not subject to the Federal laws stated in this subdivision.

Authority: Sections 407, 55721, Food and Agricultural Code

Reference: Sections 404, 56382.5, Food and Agricultural Code, Section 15376, Government Code.

Section 1703.1 ALTERNATIVE DISPUTE RESOLUTION PURSUANT TO PARTIES' WRITTEN CONTRACT.

(a) If, within the time frame found in The Act, the respondent elects to pursue a different ADR process pursuant to the parties' written contract, the Department shall cede authority to that process. The Department's jurisdiction may be restored under certain circumstances. These circumstances are set out in The Act.

(1) If one of the parties believes the other is not pursuing ADR in good faith, then he or she may be able to restore Department jurisdiction. These circumstances are set out in the Act.

Authority: Sections 407, Food and Agricultural Code

Reference: Sections 404, 56382.5, 56444, 55743, Food and Agricultural Code; 15376, Government Code

Section 1703.2 INSTITUTING DEPARTMENT'S ALTERNATIVE DISPUTE RESOLUTION PROCEDURE.

(a) Submission of a Verified Complaint, written denial of federal jurisdiction, two copies of relevant documents in the complainant's possession, and payment of \$60 trigger the jurisdiction of the Department's ADR process, subject to the reservations set out in Section 1703(a)

(1) The Department shall notify the respondent and demand relevant records within five business days of the receipt of a Verified Complaint by sending a notice and demand by certified mail. A Verified Complaint shall consist of either a copy of complainant's PACA complaint or a completed Department form complaint. The Department shall enclose one copy of the complainant's documents with the notice and demand. The respondent shall deliver two sets of the records demanded within thirty (30) calendar days of the date on the notice and demand letter.

(A) The Department shall determine which records are relevant based upon the complaint and specify those records in its notice and demand letter.

(B) Exercise of a party's election to pursue a contract ADR process, as described in Section 1703.1, does not cut off this requirement. Respondent shall turn over two sets of the records regardless of whether or not a contract ADR process is pursued. The Department shall use the records to decide whether they provide a reasonable basis for discipline. The Department shall retain them in case ADR jurisdiction is restored.

(C) The Department shall send one copy of the records to the complainant and shall retain one copy for its own purposes.

(D) Willful failure to deliver the records to the Department is cause for discipline as a flagrant violation of The Act. It is also cause for civil penalties and possible criminal prosecution. The Department shall issue a second notice by registered mail if the respondent fails to deliver the records on time. Failure to deliver following a second notice establishes a rebuttable presumption the failure is willful.

(E) Multiple simple failures to deliver records to the Department is also cause for discipline as repeated violations of The Act.

(F) If the Department establishes the charge at hearing, the hearing Administrative Law Judge may not rule "de minimus" either a willful failure or repeated failures, but shall impose discipline at the next step in severity due under the doctrine of "Progressive Discipline."

(2) The Department shall issue a summary based upon a reading of the records received. The Department may attempt to verify the accuracy of the records received through investigation.

Authority: Sections 407, 55721, 56183.5(c), Food and Agricultural Code

Reference: Sections 404, 56382.5, Food and Agricultural Code: Section 6250 et seq.; 15376, Government Code

Section 1703.3 REQUEST FOR FORMAL ALTERNATIVE DISPUTE RESOLUTION

(a) If parties have not achieved a settlement within thirty (30) days after the summary has been issued, as described in Section 1703.2, either the complainant or the respondent may initiate formal ADR by paying \$300 and submitting the Department's prescribed "Request for Formal

ADR" form [28-013 (Rev. 11/99)]. If the Department receives such a request, it shall refer the case to the American Arbitration Association (AAA) in order for ADR to commence within ninety (90) calendar days of receipt.

(1) If the Department does not receive such a request within sixty (60) calendar days from the date it mails its summary, the Department shall close the file.

(2) The Department shall use AAA to conduct ADR. AAA shall conduct ADR under its procedures and standards in accordance with working protocols between the Department and AAA, negotiated by the Department in consultation with the Market Enforcement Advisory Committee, consistent with these regulations.

(A) AAA's San Francisco office shall contact parties directly to provide a list of potential AAA hearing officers available in central locations nearest the complainant. It is the responsibility of parties to deal with AAA directly to complete arrangements and notify the Department if parties need the Department's assistance (including financial under subparagraph (c), following).

(b) Parties may wish to seek the advice of counsel.

(c) If the AAA hearing officer orders an audit, an act in his or her sole discretion, the Department shall, upon notification, advance the costs. The AAA hearing officer shall apportion all costs (including those of the audit) at the close of the hearing.

(1) The Department may not absorb these costs. The Department shall pursue all available remedies to collect reimbursement of these costs once they are apportioned by the AAA hearing officer. The Department may not forgive the debt.

(2) The Department shall require the parties to sign a promissory note prior to advancing the costs of an audit. The promissory note shall require the parties to repay as ordered by the AAA hearing officer and shall notify the parties of the possibility of enforcement measures.

(d) Parties may wish to obtain from AAA and review a copy of the pamphlet "Alternatives to Litigation" when commencing the ADR process.

Authority: Section 407, Food and Agricultural Code

Reference: Sections 404, 56382.5, Food and Agricultural Code; Section 6250et seq., 15376. Government Code

Section 1703.4 AAA HEARING

(a) The AAA hearing officer shall render a written decision and furnish the Department with a copy at the time he or she sends it to the parties.

(1) The Department shall not interfere with the independent judgment or process of the AAA hearing officer.

(2) Determinations that conditions of licensure have been violated are not within ADR's jurisdiction. Any purported findings of such violations, whether express or implied, may not be construed *res judicata* or *collateral estoppel*, nor in any other way binding or persuasive authority in the Department's imposition of licensing discipline.

(3) The Department shall consider this decision in its independent consideration of what discipline, if any, may be appropriate.

(4) If the Department determines that a party did not participate in good faith during the dispute resolution process, that party shall be subject to license discipline. examples of a failure to negotiate in good faith, include, but are not limited to, failure to abide by the terms of the agreement reached during the dispute resolution process, and failure to pay the required costs incurred during the process, either to AAA or to the Department.

(b) The AAA hearing officer may not order the decision or record sealed. Parties may not agree to seal them. However, as an investigative tool being used in an investigation in progress, neither the decision nor the record shall be construed to be a public record subject to public disclosure unless and until it leads in some way to the filing of an auction to impose discipline.

Authority: Section 407, Food and Agricultural Code

Reference: Sections 404, 55744, 56382.5, 56445, Food and Agricultural Code; Section 6250 et seq., 15376. Government Code

Section 1703.5 WHAT IF I FILED A VERIFIED COMPLAINT PRIOR TO JANUARY 1998?

(a) Beginning January 1, 1998, the Department shall offer complainants who filed Verified Complaints prior to January 1, 1998, and respondents the opportunity to use the new Alternate Dispute Resolution process instead of the settlement and hearing process in effect when the complaints were filed. This offer shall be writing and served by registered mail at the last known address of complainant first. If the complainant agrees in writing within thirty (30) calendar days from receipt, the Department shall extend the offer to the respondent (again in writing and served by registered mail at respondent's last known address). Unless the respondent objects in writing within (30) calendar days from date of receipt, the Department shall convert the pre-January 1, 1998 case to the post-January 1, 1998 system and notify parties of the next step due under that process.

(b) Whether or not complainant elects to use the new process for resolving the private dispute, licensing hearings shall be conducted according to the procedure described in these regulations no matter when the issues arose or how they came to the attention of the Department.

(1) The substantive law which applies to complaints filed prior to January 1, 1998 shall continue to be the pre-January 1, 1998 law.

(2) A complainant's decision to continue under the old process for resolving private disputes may result in the joint conduct of a licensing hearing and a private dispute hearing. In that circumstance, the presiding Administrative Law Judge shall hold a pre-hearing conference to work out order of hearing and related issues.

Authority: Section 407, Food and Agricultural Code

Reference: Sections 404, 55483(c), 55485.75, 55488, 55525.75, 55528, 55721, 55722.5, 56185.5, 56186.75, 56190, 56382.5, Food and Agricultural Code; Chapter 4.5 (commencing with Section 11400), Chapter 5 (commencing with Section 11500), Government Code

ARTICLE 5. DISCIPLINE OF LICENSEES

Section 1704. VIOLATIONS.

(a) The Department has several options for dealing with violations of licensing law, including but not limited to civil penalties, criminal charges, or administrative discipline. These options are not mutually exclusive. The Department may pursue one or all, at the same time or in phases, at its discretion. These regulations address only administrative discipline.

(b) Once an initial license has been issued unconditionally, a license becomes *vested*. The Department shall meet both substantive and procedural requirements if it intends to discipline the licensee. The Department bears both the burden of proof and the burden of producing evidence. The Department shall prove each disputed element of any charge which the Department contends warrants discipline.

(1) Although The Act refers to Renewal Applications, "denials" of renewal applications shall be treated as "revocations" for all procedural and substantive due process purposes.

(2) The standard of proof is "preponderance of the evidence" rather than either "clear and convincing" or "beyond a reasonable doubt".

(c) If the Department reasonably believes a licensing action is warranted, the Department may bring charges against the licensee. The Department shall notify the licensee in writing. The notice shall include a statement of charges, called an "Accusation," that sets out the elements which are grounds for discipline.

(1) The Department may issue an Accusation even when where a settlement or plan of correction has been negotiated. That Accusation is a public record subject to public disclosure. The contents of an Accusation are subject to settlement.

(d) The Department shall follow a policy of "progressive discipline" in most circumstances. As applied to The Act, "progressive discipline" means that discipline shall be imposed in increments of severity over time unless circumstances warrant a quicker resort to a more severe response. A corrective action plan shall generally be imposed first, followed by Probation and/or Suspension of the License, followed by Revocation. However, discipline may progress faster depending on the severity of the misconduct or the licensee's intentions when committing the violation(s).

Authority: Section 407, Food and Agricultural Code
Reference: Sections 263, 404, 55435.5, 55484, 55484.75, 55485.5, 55524, 55524.5, 55524.75, 55722, 56133.5, 56185.5, 56185.75, Food and Agricultural Code; Sections 6250, 6252, Chapter 4.5 (commencing with section 11400), Chapter 5 (commencing with section 11500), Government code

Section 1704.1 APPEAL PROCEDURES.

If the licensee wishes to appeal the disciplinary action undertaken by the Department, the procedures under Section 1706.1 of these regulations should be followed.

Authority: Section 407, Food and Agricultural Code
Reference: Sections 404, 55485.75, 55488, 55525.75, 55528, 56186.75, 56190, Food and Agricultural Code, Chapter 4.5 (commencing with section 11400), Chapter 5 (commencing with section 11500), Government Code

Section 1704.2. EFFECT OF A REVOCATION

If a license is revoked, the Department shall not consider a new application from the same licensee for a period of time required by statute. That period is two years from *the later* of the date found on an uncontested Accusation or the effective date of the Decision and Order adopting a contested Accusation. If the Department finds such a prior revocation, the Department shall cease to consider the application and shall notify the applicant as soon as possible. Such notifications is not a denial and does not convey any rights to a hearing.

Authority: Sections 407, 55483(c), 56183.5(c), Food and Agricultural Code
Reference: Sections 404, 55435.5(b), 55485.5, 55488, 55484.75, 55524.75, 55525.75, 55528, 56133.5(b), 56186.5, 56185.75, 56186.75, 56190, Food and Agricultural Code; Chapter 4.5 (commencing with section 11400), Chapter 5 (commencing with section 11500), Government Code

ARTICLE 6. DISMISSALS, RNAME OF DISCIPLINE, AND SETTLEMENTS

Section 1705. GENERAL.

(a) Neither the Secretary nor anyone acting on behalf of the Secretary, including the hearing ALJ, shall dismiss a case in which the Department proves a violation, however minor, The Act.

(b) Notwithstanding subdivision (a), the Department may settle a revocation or a denial prior to or after a hearing. It may, following hearing, adjust discipline based upon factors set out in The Act.

(1) Settlements may include, by way of example and not limitation, tailoring admissions or the effective date of action in exchange for longer that statutory prohibitions on reapplication; Conditional Licenses; stays of revocation pending performance on probationary status; licensee payment for heightened scrutiny during probation; suspensions; restitution; sealing of the stipulation; modifying the Accusation or Statement of Issues, or any combination of conditions that tailor the discipline to the circumstances of the case.

(2) Settlements shall be in writing and signed by the parties or their respective counsel.

(c) An order shall be issued even where based upon sealed stipulation. A deputy to whom the Secretary has delegated the authority shall sign on behalf of the Department.

(1) The order shall incorporate the settlement by reference and note the sealing of the stipulation.

(d) While stipulations may be sealed, the Accusation or Statement of Issues and the order shall not be sealed.

Authority: Sections, 407, 55483.5(c), 56183.5(c), Food and Agricultural Code
Reference: Sections 404, 55484.5, 55485.75(d), 55524.5, 55525.75(d), 56185.5, 56186.75, Food and Agricultural code

ARTICLE 7. HEARING PROCEDURES

Section 1706. LICENSE DENIAL.

(a) If hearing is requested under Article 3 of these regulations, the following procedures apply:
(1) The Department shall issue a Statement of Issues. The following documents shall accompany the notice:

(A) a Notice of Defense form with preprinted address and facsimile telephone number for filing, so that the applicant may request a hearing by either of these means;

(B) a Request for Discovery form with preprinted address for filing, so that the applicant may request discovery; and,

(C) a copy of the Statutes and regulations applicable to the reasons for the Department's denial.

(b) If the applicant submits a Notice of Defense within the time frame, the Department shall schedule a hearing within 90 calendar days of its receipt. If the applicant does not submit the Notice of Defense within the time frame set out in statute, the Department's denial is final for all purposes.

(1) An applicant may "waive time." The Department and an applicant may agree in writing to a later date to begin a hearing. The Department may do so if the applicant says it would improve the applicant's presentation of his or her case or fit his or her schedule better. The Department shall not agree to an extension that would postpone the hearing more than one (1) year from the Department's receipt of the Notice of Defense.

(c) An appellant applicant may obtain a brochure from the Market Enforcement headquarters office that explains procedures under Chapters 4.5, and 5 of the Government Code. The Department follows these procedures generally, although it does not require strict compliance with the Office of Administrative Hearing's (OAH) "Rules of Court."

(1) The Code authorizes either Administrative Law Judges (ALJ) appointed by the Department or by OAH to conduct the hearing. The Department shall assign its own ALJ unless the applicant specifically requests an OAH hearing or unless the Department determines an OAH assignment to be warranted by the circumstances of a particular case or caseload. If an applicant desires an OAH hearing, the Department shall arrange one if the applicant meets two conditions: (A) the applicant shall agree in writing to be bound by the OAH "Rules of Court"; and (B) the applicant shall pay the Department in advance the estimated difference in cost between the two types of proceedings. The Department calculates the estimated difference based on the following formula: the sum of the difference between the OAH daily billing rate and the Department's daily rate, multiplied by the party's estimate as to the duration of trial. The Department shall remit any credit balance to the applicant after issuance of the final decision. The Department shall bill the applicant for any debit balance.

(d) ALJs hearing Market Enforcement cases have some limitations that OAH judges hearing other types of cases do not. Food and Agricultural Code sections 55488, 55528, and 56190 describe these limitations. These limits apply whether the presiding judge is a Department employee or an OAH Administrative Law Judge.

(e) An applicant shall meet both substantive and procedural requirements. An applicant bears both the burden of proof and the burden of producing evidence adequate to convince the Department that the Department should license the applicant.

(f) The appellant may expect a written decision within sixty (60) calendar days after submission. Submission means the party's presentation has concluded.

(1) Sometimes judges require written closing arguments or give parties the opportunity to send in documents after the hearing. The sixty days shall not begin to accrue until after the submission of these documents.

(2) The sixty (60) days are guideline, not mandate. The Department has no power to force a judge to actually produce the decision within sixty (60) calendar days.

(g) The Department may settle with the appellant at any time prior to the release of a final decision. Settlement, called a "Stipulation and Order," may include (but is not limited to) the issuance of a Conditional License on terms negotiated between parties.

Authority: Sections 407, 55483(c), 56183(c), Food and Agricultural Code

Reference: Sections 404, 55485.75, 55488, 55525.75, 55528, 56186.75, 56190, Food and Agriculture; Chapter 4.5 (commencing with section 11400), Chapter 5 (commencing with section 11500) 15376, Government Code

Section 1706.1 ACCUSATION

(a) Hearings commenced pursuant to Article 5 of these regulations are conducted with the procedures described in Section 1706 with the following exceptions:

(1) The document notifying the licensee that licensing discipline is being undertaken is called an Accusation.

(2) The Department bears the burdens of proof and producing evidence to convince the ALJ that the licensing discipline should be upheld.

Authority: Sections 407, Food and Agricultural Code

Reference: Sections 404, 55528(f), 56190 (f), Food and Agricultural Code